



Shoukat & another v Kodhek & 3 others (Environment & Land Case 59 of 2015) [2022] KEELC 13713 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13713 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 59 OF 2015**

**LL NAIKUNI, J
OCTOBER 4, 2022**

BETWEEN

MOHAMED RIAZ SHOUKAT 1ST PLAINTIFF

SHOUKAT MOHAMED NOORANI 2ND PLAINTIFF

AND

YASINI ABUBAKAR ARGWINGS KODHEK 1ST DEFENDANT

MASRAF ABUBAKAR LTD 2ND DEFENDANT

BARAWA NYAWA NDORO 3RD DEFENDANT

KENYATTA MWERI MANGI 4TH DEFENDANT

RULING

I. Introduction

1. Before the Honorable Court is the Notice of Motion Application by the 1st, 2nd, 3rd and 4th Defendants/Applicants dated and filed on 19th November 2021. It is brought under the provisions of the Sections 3A and 63 (e) of the *Civil Procedure Act*, Cap. 21 and Order 22 Rule 25 of the Civil Procedure Rules, 2010. Essentially, the application seeks a stay of execution of an Order dated 13th February 2021 delivered against them by this Honorable Court upon hearing and determining the Notice of Motion Application dated 4th September 2018.
2. For context purposes, this Court held that the Defendants/Applicants herein were in defiance of an earlier court Decree, delivered in open court on 7th June 2017 and issued on 12th October 2017, granting a permanent injunction restraining the Defendants/Applicants herein or their agents and/or servants from alienating, subdividing, cutting, disposing off, constructing on and trespassing of the suit property Plot No. 289/I/M.N. Bamburi, Mombasa.



II. The 1st, 2nd, 3rd & 4th Defendants/Applicants case.

3. The 1st, 2nd, 3rd & 4th Defendants/Applicants herein sought for the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this application this Honorable Court be pleased to grant a stay of execution of the Order dated 13th February 2021 or any other subsequent orders therefrom entered against the Defendants/Applicants.
 - c. That this Honorable Court be pleased to set aside the Order dated 13th February 2021 entered against the Defendants/Applicants together with any consequential Decree and Orders of the Court as the Court may deem fit.
 - d. That the costs of this Application be provided for.
4. The said application is based on the grounds, testimonial facts adduced thereof and the averments contained in the 16 Paragraphed Supporting Affidavit of the 4th Defendant/Applicant herein, KENYATTA MWERI MANGI sworn and filed on 19th November 2021 and the three (3) annexures Marked “A”, “B” and “C” which are attached thereof.
5. From the averments made in the said supporting affidavit, he deponed that on 13th February 2019 Honorable Justice C. Yano issued an order directing that all structures erected and constructions done on all the suit land - Plot No. 289/I/MN Bamburi Mombasa in defiance of the permanent injunction orders issued by the court be demolished and expenses incurred in the demolition be incurred and be borne by the Plaintiffs. According to the Deponent, the Court observed that that several Defendants had constructed permanent buildings as from the evidence adduced and annexed being copies of photographs marked as “B”.
6. He claimed that, based on this subsequent Court order, the Plaintiffs/Respondents had threatened the Defendants/Applicants herein with execution of the Order dated 13th February 2019, thereby evicting and demolishing properties that the Defendants/Applicants and their families where they all reside in. He further asserted that the electricity supplier – the Kenya Power & Lighting Limited had already been notified of the this eminent demolition vide the Plaintiffs’ letter dated 22nd November 2019, annexed and marked as “C”.
7. Based on the evidence provided in the Supporting Affidavit, he averred that by the time the suit was commenced, there were already structures built on the suit property and that the Plaintiffs/ Respondents herein had initially filed the suit seeking permanent injunction orders against the Defendants/Applicants but they did not specifically pray for eviction and demolition. Additionally, he argued that there were no applications for contempt of court orders to establish who exactly was in contempt. Thus, it was his view that the Plaintiffs/Respondents’ application dated 4th September 2018 lacked photographic evidence and for these reasons, the Order of the court dated 13th February 2019 for eviction and demolition was not warranted.
8. In conclusion, his prayers to this Honorable Court were for orders to stay and set aside the Order dated 13th February 2019 and all consequential orders thereafter as the Defendants/Applicants risked eviction and substantial loss.



III. The Plaintiffs/Respondents' Replying Affidavit

9. On 14th December 2021, the Plaintiffs/Respondents filed a fourteen (14) Paragraphed Replying Affidavit sworn on 9th December 2021 by the 1st Plaintiff/Respondent, Mohamed Riaz Shoukat. He deposed that the Plaintiffs/Respondents herein filed the Notice of Motion application dated 4th September 2018 for the purposes of seeking an order to enforce the permanent injunction granted by this Court on February 14, 2019. He maintained that the aforesaid application resulted in the issuance of the Order dated February 13, 2019 and that the defendants/applicants had neither made an application for review, setting aside nor appealed against it whatsoever. Furthermore, he added that the period for application for review or appeal has long lapsed.
10. He contended that the current application by the Defendants/Applicants seeking to stay and set aside the Order for eviction and demolition was a veiled and mischievous attempt by the defendants/applicants to appeal against the ruling of 13th February 2019 through the back door. He added that the permanent injunction issued by the court was in effect a prohibitory and mandatory injunction for the eviction of the Defendants/Applicants and demolition of the structures on the suit property.
11. Additionally, in response to the averments made out under Paragraph 11 of the Supporting Affidavit by the 4th Defendant/Applicant, the 1st Plaintiff/Respondent contended that the act of trespass and existence of illegal structures constructed on the suit property by the Defendants/Applicants were amongst the reasons why the Plaintiffs/Respondents moved to court and filed the suit. He argued that the illegal structures were evidence of trespass by the Defendants on the suit property.
12. In conclusion, the 1st Plaintiff/Respondent maintained that as far as the 4th Defendant/Applicant's assertion made under the contents of Paragraphs 13 and 14 of the Supporting Affidavit and resultant Court order, that the Defendants/Applicants were trying to re-argue that application which was determined more than three (3) years ago.

IV. Submissions

13. On diverse dates of 16th December 2021 and 10th February 2022 respectively in the presence of all the parties, it was directed that the said Notice of Motion application be canvassed by way of written submissions. On 22nd March 2022, the matter came up for mention to confirm filing of submissions. Counsel for the Plaintiffs/Respondents was present and stated that they had not been served submissions by the Defendants/Applicants. The court ruled that the Defendants/Applicants had been granted enough time to file and serve their submissions since they had been ordered to do the same when the matter came up in court. For failure to adhere with the stringent timelines granted to parties, the Honorable Court locked out the Defendants/Applicants from filing any written submissions and that it would proceed to render its ruling thereof.
14. However, the Defendants/Applicants filed a Notice of Motion application through Certificate of Urgency dated 12th April 2022 and supported by an affidavit sworn by Ayiro Chahilu, the Defendants/Applicants' Advocate requesting audience of the court during the High Court Easter Vacation recess and adoption of the Defendants/Applicants written submissions dated 11th February 2022. Nonetheless, out of the interest of Justice, equity and Conscience, the court allowed the Defendants/Applicants' application.

A. The Written Submission by the 1st, 2nd, 3rd & 4th Defendants/Applicants

15. On 11th February 2022, the Learned Counsel, the Law firm of Messrs. Ayiro Chahilu & Company for the 1st, 2nd, 3rd & 4th Defendants/Applicants herein filed their written submissions in support



of the application. Mr. Ayiro Advocate submitted that the Defendants/Applicants, through their application, supporting affidavit and annexures, had fulfilled the requirements set out in the case of “*Giella – Versus - Cassman Brown & Co Limited* (1973) EA 358, which held that the existence of “a prima facie case” with high chances of success, the applicant likely to suffer irreparable damage which cannot be adequately compensated by an award of damages if the injunction was not granted and further, that the balance of convenience tilted in their favour.

16. On the 1st requirement of a prima facie case, the Learned Counsel submitted that the Defendants/Applicants had clearly demonstrated the existence of a right that was under threat. In support of this, he relied on the case of “*Kenleb Cons Limited – Versus - New Gatitu Service Station Limited & another*” where the court held that the applicant for injunction must show that he has a right, legal or equitable, which requires protection by injunction.
17. On the 2nd requirement of irreparable damage, the Learned Counsel argued that the Defendants/Applicants’ interests in the suit property was under threat due to the eviction and demolition order. On the issue of balance of convenience, the Learned Counsel contended that the Plaintiffs/Respondents were unlikely to suffer any injury should there be a determination in the Defendants/Applicants favor. Thus, he urged Court to grant them the orders as prayed from the filed application thereof.

B. The Written Submission of the Plaintiffs/Respondents

18. On 23rd May 2022, the Learned Counsel, the Law firm of Messrs. Muturi, Gakuo & Kibara for the Plaintiffs/Respondents filed their written submissions against the application filed by the Defendants/Applicants herein. The Counsel, M/s. Mulongo Advocate submitted that the court had already determined the matter to finality vide the Judgment delivered on 7th June 2018 and hence it had no jurisdiction to entertain the matter further. In saying so, he relied on the doctrine of “functus officio” as quoted in the Supreme Court case of “*Raila Odinga & 2 others -Versus - Independent Electoral & Boundaries Commission & 3 others* (2013) eKLR which explained that a person with adjudicative or decision-making power may only exercise those powers only once in relation to the same matter. He urged the court that the Defendants/Applicants herein were asking the court to sit on an appeal of its own judgment yet according to the Counsel, the Court had already become “functus officio” and therefore could not grant the orders sought of setting aside the orders issued by it on February 13, 2019 nor arising from the same doctrine, could it review its own judgment delivered in favor of the Plaintiffs/Respondents. According to the Counsel, if the Defendants/Applicants were aggrieved by the orders of this court, then their only recourse or avenue was to prefer an appeal before the Court of Appeal but certainly not to apply to the same court to set aside the same. In support of this submission, the Learned Counsel relied on the case of “*Telkom Kenya Limited – Versus - John Ochanda (Suing on his own behalf and on behalf of 996 employees of Telkom Kenya Limited)* (2014) eKLR where the Court of Appeal quoted the case of “*Jersey Evening Post Limited – Versus - Ai Thani* (2002) JLR 542 at 550” which stated that a court was “functus Officio” when it had performed all its duties in a particular case and once all proceedings were concluded. In that situation, the court could not review or alter its decisions.
19. In conclusion, the Learned Counsel urged the Honorable Court to dismiss the application filed by the 1st, 2nd, 3rd & 4th Defendants/Applicants herein dated 19th November 2021 with costs.

V. Analysis and Determination

20. I have keenly read all the filed pleadings, the submissions, the cited authorities and the appropriate and applicable provisions of *the Constitution* of Kenya and the Statutes. In order to arrive at an informed, reasonable, just and fair decision, the Honorable Court herein has framed the following three (3) issues for its determination. These are:-



- a. Whether the 1st, 2nd, 3rd & 4th Defendants/Applicants herein through their filed application dated 19th November, 2021 have met the threshold for orders of stay and setting aside of the orders issued on 13th February 2019.
- b. Whether the parties herein are entitled to the reliefs sought herein.
- c. Who will bear the Costs of the application?

ISSUE No. a). Whether the 1st, 2nd, 3rd & 4th Defendants/Applicants herein through their filed application dated 19th November, 2021 have met the threshold for orders of stay and setting aside of the orders issued on 13th February 2019.

21. Under this sub – heading, this Court wishes to assess the laws and principles that govern the stay of execution, setting aside a court order as sought out by the Defendants/Applicants. The Stay of Execution was brought under the provision of order 22 rule 25 of the *Civil Procedure Rule*, 2010. The Rule provides that: -

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided”.

22. What this provision of law means is that, if a suit is pending before court between a decree holder and a judgment debtor, a court may, in its discretion, order a stay of execution of the decree until the pending suit is determined. For one to be granted the orders sought, the presumption herein is that the following ingredients ought to be fulfilled. These three (3) pre - conditions: -

- a. There ought to be a suit pending in any court;
- b. The pending suit ought to be against the holder of a decree of such court;
- c. The suit ought to be in the name of the person against whom the decree was passed;

Should the above three fundamentals be fulfilled, then the Court would have the discretion to grant the stay pending the hearing of the suit but such terms it may deem fit or suitable such terms as to security or otherwise. This was better illustrated by Odunga J in the case of:- “Peter Kilonzo Kioko – Versus - Monarch Insurance Co. Limited; Kisakwa Ndolo King’oku (Sued as Legal Representative of the Estate of Mwanja Kisakwa - Deceased (Interested Party) [2021] eKLR where he explained the provision of Order 22 Rule 25 to mean: -

“What this provision means is that A files a suit against B and obtains a judgement therein. However, B files a separate suit against A. B is in those circumstances entitled to seek that pending the hearing and determination of the subsequent suit, the execution in the earlier suit be stayed.”

23. In this particular case, the 1st, 2nd, 3rd & 4th Defendants/Applicants herein are, through their application dated November 19, 2021, seeking orders for stay against the Order issued by this court on February 13, 2019. What then is the threshold for granting orders for stay of execution as per order 22 rule 25?



In the case of :-“*Tom Ojienda & Associates – - Versus - Nairobi City County Assembly* [2017] eKLR, the court stated that: -

“For the application of order 22 rule 25, there must be two suits between say A and B. In one suit there must be a decree in favor of A against B. In the other suit, it must be B who is suing A.”

24. There is no doubt that the Plaintiffs/Respondents herein are Decree Holders and the Defendants/Applicants are Judgment Debtors herein from this case. However, based on the legal provisions made herein, this court holds that the provisions of under order 22 rule 25 of the *Civil Procedure Rules, 2010* do not apply in this case at all. This Court holds this position based on the following legal reasonings.
- Firstly, there is only one single suit on this matter by the Plaintiffs/Applicants herein. There is no other pending suit brought against the Plaintiffs/Respondents by the Defendants/Applicants.
- Secondly, the Defendants/Applicants have failed to provide the court with any authority in which a stay of a decree has been granted under order 22 rule 25. In fact, their submissions filed on February 11, 2022 have failed to address the court on the relevant provisions of the orders 22 rule 25 cited herein. On the contrary, and its on record, it is evident that in a rather hurriedly prepared Submission, they have absent mindedly digressed and instead purely relied on case law on granting of injunctions instead.
25. From the above justification, the Honorable Court has been led to fully concur with the assertions made of the Learned Counsel for the Plaintiffs/Respondents to the effect that the Defendants/Applicants’ application is a veiled and mischievous attempt by the Defendants/Applicants to appeal against the ruling of February 13, 2019 through the back door.
26. Thus, it is my view that the court is certainly satisfied that the Applicants’ application does not meet the threshold for granting a stay of execution of a decree as per order 22 rule 25.
27. With regard to the prayers of setting aside the orders of this Court issued on February 13, 2019 against them for demolition. On their part the Plaintiffs/Respondents have submitted that the Defendants/Applicants’ application is defective. They held it was akin to asking the court to sit on appeal of its own orders. The Plaintiffs/Respondents further submitted that the court was “functus officio” and if the Defendants/Applicants were aggrieved by the Judgment dated June 7, 2018 and/or the Ruling issued on February 13, 2019, then the right forum to seek recourse would have been to file an appeal.
28. Once again, this Honourable Court agrees with the Learned Counsel of the Plaintiffs/Respondents to the extend that this court was “functus officio” as the Judgment was delivered and perfected through the subsequent Order dated February 13, 2019. While arriving at this decision, I am guided by the case of “*Jersey Evening Post Limited – Versus - A1 Thani* [2002] JLR 542 at 550” where the Court held: -

“A court is “functus” when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

On that front, therefore, the application and the orders sought by the Defendants/Applicants can not succeed whatsoever.



ISSUE No. c). Whether the parties are entitled to the relief sought.//

29. As stated above, under this Sub heading, this Court finds that the Defendants/Applicants have failed to demonstrate that they are entitled to the reliefs sought from Court. In saying so, this Court cannot close its eyes to the fact that what the Defendants/Applicants are seeking through their present application, is for the court to sit in appeal over its own judgment and if it allows the application, the Defendants/Applicants will in effect reopen the case through the backdoor.
30. Hence, the Court reiterates and totally agrees with the Plaintiffs/Respondents that the application was made in bad faith but an abuse of the due process of the Court. Indeed, if the Defendants/Applicants feel aggrieved by the orders of the court issued on February 13, 2019, I believe that the best recourse is by appeal but not in this manner. I need say no more on this issue.

ISSUE No. d). Who will bear the Costs of this application.

31. The issue of Costs is at the discretion of the Court. Costs means the award after the conclusion of any legal action, proceedings and litigation process. The proviso of Section 27 (1) of the *Civil Procedure Act*, 21 provides that costs follow the event. The event means the result of the said any legal action, proceedings and litigation process.

A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. See the case of “*Hussein Janmohammed & Sons – Versus – Twentsche Overseas Trading Company Limited* (1967) EA 287. In the instant case, taking that the 1st, 2nd, 3rd & 4th Defendants/Applicants have failed to prosecute their application on preponderance of probability they should bear the costs of the said application to be awarded to the Plaintiffs/Respondents herein.

VI. Conclusion & Disposition.

32. In the final analysis, after conducting an elaborate analysis of the framed issues herein, this Court holds that the 1st, 2nd, 3rd & 4th Defendants/Applicants’ through their application dated 19th November 2021 has not been successful at all. For these reasons then, I proceed to make the following orders:-
- a. That the Notice of Motion application dated 19th November, 2021 by the 1st, 2nd, 3rd & 4th Defendants/Applicants herein be and is hereby dismissed for lack of merit and being an abuse of the Court process with costs.
- b. That the 1st, 2nd, 3rd & 4th Defendants/Applicants herein to bear the Costs of the application.

It Is Ordered Accordingly.

RULING DELIEVERED, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF OCTOBER 2022.

HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT AT MOMBASA

In the presence of :-

- a. Mr. Buko & Mr. Omar the Court Assistant.
- b. M/s. Mulongo holding brief for Mr. Kibara Advocate for the Plaintiffs/Respondents.
- c. No appearance for the 1st, 2nd, 3rd & 4th Defendants/Applicants.

